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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-846

GLEN D. GRAVES, LEWIS WEINSTEIN, AND GRAVES CONSTRUCTION COMPANY, INC. a/k/a GRAVES CONSTRUCTION, INC.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

The petition of Glen D. Graves, Lewis Weinstein, and Graves Construction Company, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1977, reversing the district court's dismissal of the indictment against petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on August 5, 1977. It has not yet been reported, but in the pagination of Fifth

Circuit slip opinions, it appears as p. 4956. The opinion is reproduced in the appendix. No opinion was issued on the denial of rehearing and rehearing en banc on October 12, 1977. The United States District Court for the Western District of Louisiana issued no written opinion.

JURISDICTION

This prosecution was presented by indictment in the United States District Court for the Western District of Louisiana under 18 U.S.C. §§2, 371, 1010 of the Criminal Code. On the dismissal of the indictment by the district court, the Government appealed to the Fifth Circuit under the authority of 18 U.S.C. §3731.

The decision of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the district court is dated and was entered August 5, 1977. A timely petition for rehearing and rehearing en banc was denied October 12, 1977.

On timely application to Mr. Justice Powell, an order was entered extending the time to file the petition for writ of certiorari to and through December 11, 1977. Since December 11, 1977 is a Sunday, the petition is timely filed on Monday, December 12, 1977. Rule 34(1), Revised Rules of the Supreme Court. By order dated November 4, 1977, the district court has stayed further proceedings pending the final disposition of this Court on the petition for writ of certiorari. Jurisdiction is here invoked under the authority of 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

I. Whether a motion to dismiss a prosecution for violations of regulatory/penal laws not malum in se, predicated on due process and federal court supervisory objections to the condonation and encouragement of the violations by the affected federal agency, must fail because the federal agency in question is not a "law enforcement" agency?

II. Whether the United States Court of Appeals for the Fifth Circuit erroneously applied "entrapment" concepts and limitations, in a case in which overinvolvement by a Government agency in condoning, acquiescing, and encouraging violations was objected to on due process grounds, and the supervisory protection of the federal courts over the consequent prosecution sought?

CONSTITUTIONAL PROVISION INVOLVED

The Due Process clause of the Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioners Glen D. Graves, Lewis Weinstein, and Graves Construction Company, Inc. were indicted in the Western District of Louisiana for submitting false statements to the Federal Housing Administration (hereinafter "FHA") in order to obtain mortgage in-

surance under Sec. 235 of the National Housing Act of 1968, and for conspiracy. 18 U.S.C. §§2, 371, and 1010. The indictment alleged that petitioners had (a) fraudulently attempted to secure mortgage insurance for Sec. 235 home purchasers whom they knew were not qualified; (b) falsified documents submitted to FHA concerning the income, assets, liabilities, credit, employment, and other information pertaining to prospective mortgages; and (c) failed to comply with the statutory requirement of obtaining a $200.00 down payment from each prospective mortgagor and falsifying documents pertaining thereto.

Before trial petitioners filed a motion to dismiss the indictment under Rule 12, F.R.Cr.P., alleging among other things:

> (d) If the Federal Housing Administration knew of, acquiesced in, approved and/or encouraged such alleged false statements and did not have discretionary authority to do so and said acts were criminal, then the Federal Housing Administration engaged in governmental misconduct and Defendants are denied Due Process of Law as provided by the Fifth Amendment to the United States Constitution by this Indictment and prosecution.

Testimony at the hearing under the motion showed petitioner Graves to have operated a home building company, and petitioner Weinstein to have been Graves' attorney and an officer of the company. The company sold houses to low-income families seeking

FHA financing under Sec. 235 of the National Housing Act of 1968. Before the indictment dates, the company did not accept as potential customers any applicants who fell short of the credit or $200.00 down payment regulations. Petitioner Graves began to learn that persons whom his firm had rejected had obtained FHA-approved financing with rival builders only a short time after his firm had rejected their applications.

Graves complained to the local FHA officials at the Shreveport office about the practice, but no action was taken in response to the complaint. Graves collected approximately 75 affidavits from homebuyers who had not furnished the $200.00 down payment, or who had otherwise failed to comply with the technical terms of FHA credit and other regulations. On being confronted with the affidavits, the local FHA officials responded that technical compliance was unimportant, and that the Shreveport office had the authority to waive any and all of those requirements. Petitioner Graves took his complaint to the regional office in Fort Worth, Texas, but received no satisfaction there either.

The meetings with the local FHA officials produced the following advisements, among others, to petitioner Graves:

> He said, "I run this and I run it the way I want it run and I waive what I want waived."
>
> I said, "If you waive down payments for all these people, I can't live or survive in a busi-

ness in such a small area where all the builders are building; where you allow these people to run rampant in total disregard of all the regulations as far as down payments, as far as credit, as far as dependents, as far as income, and letting these people buy houses and you are saying to me to follow the regulations as I understand them and you are saying this is none of my business."

I said, "I tell you, it is my business. If the down payments are waived for these people, they must be waived for me." TR. 289-290

* * *

He said, "The regulations state what I say they state."

I said, "You are telling me you are all-powerful, that you have the total and absolute authority?"

He said, "That's right." TR 290-291

* * *

Q. Will you state whether or not after the meeting in the spring of 1971 with Mr. Langford [the head of the local FHA office] you were of the opinion you could sell a house without getting a down payment?

A. Yes. He made it so crystal clear to me that the down payment and really none of the articles and Section 235 apply to building the houses, and he stated his job is to build the houses and get poor people into them.

Q. It is only after that day that you had a belief in your own mind—

A. I said that he is all-powerful and he is the Government official who heads the program.

Q. As a result of that conversation, did you believe you had to have down payments?

A. No, I didn't think you had to have down payments. TR. 293

At the conclusion of petitioner's presentation on the motion, the district court invited the Government to rebut. The Government declined the invitation. In answer to "the single question of whether there was conduct on the part of the Government which was outrageous," the district court granted the motion to dismiss.

The Court of Appeals approved the pre-trial hearing procedure under the Rule 12 motion. Slip op. 4960. And it found as fact that "the government employees in this case condoned and encouraged the unlawful practices of the appellees and others." Slip op. 4964.

But the Court of Appeals felt that a "governmental misconduct defense," slip op. 4962, can only be made out on a "factual predicate required for a *Bueno* [*United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973)] defense, i.e., a 'full circle' sale of contraband . . . ." Slip op. 4963. Alternatively, the Court of Appeals refused to apply

> The defense of "outrageous governmental misconduct" . . . to governmental employees outside the field of law enforcement. Here, the inducements were alleged to have been made by individuals employed by the government in a capacity completely unrelated to criminal law enforcement. The FHA officials had no authority with respect to enforcement of criminal laws, and their actions were not undertaken for the purpose of prosecuting appellees.
>
> Slip op. 4963.

REASONS FOR GRANTING THE WRIT

Hampton v. United States, 425 U.S. 484 (1976) was decided on a plurality opinion of three justices, with Justices Powell and Blackmun concurring, and three justices dissenting. The plurality and concurrence joined in an understanding of the discrete defense of entrapment as focused on the question of predisposition of the defendant. As Justice Powell stated in the concurrence, " 'Entrapment' should now be employed as a term of art limited to that concept." 425 U.S. 492 n. 2.

Obversely, the concurring and dissenting justices joined in the proposition that in a proper case, the due process clause of the Fifth Amendment and/or the supervisory power of the federal courts would bar a prosecution on government involvement factually removed from the discrete requirements of the entrapment defense. Justice Powell tentatively explored some of the considerations which might be involved:

> [The limitation of "entrapment" to a focus on predisposition] does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the government has encouraged or otherwise acted in concert with the defendant.
>
> 425 U.S. 493 n. 2.

> In those cases [involving facts akin to those in *Hampton*] the Court was confronted with specific claims of police "overinvolvement" in criminal activity involving contraband. Disposition of those claims did not require the Court to consider whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process. Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses.
>
> 425 U.S. 493.

Judge Friendly recently expressed the view:

> "[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely

> reluctant to sanction." *United States v. Archer*, 486 F 2d, at 676-677 (Footnote omitted).

425 U.S. at 493 n. 4.

The discussion of predisposition, for example, often seems to overlook the fact that there may be widely varying degrees of criminal involvement. Taking the narcotics traffic as an example, those who distribute narcotics — the "pushers" — are the persons who, next to those who import or manufacture, merit the full sanction of the criminal law. Yet, the criminal involvement of pushers varies widely. The hardcore professional, in the "business" on a large scale and for years, is to be contrasted with the high-school youth whose "pushing" is limited to a few of his classmates over a short span of time. Predisposition could be proved against both types of defenders, and under the flat rule enunciated today by the plurality the difference between circumstances would be irrelevant despite the most outrageous conduct conceivable by Government agents relative to the circumstances. A fair system of justice normally should eschew unbending rules that foreclose, in their application, all judicial discretion.

425 U.S. 494 n. 5.

I recognize that, if limitations on police involvement are appropriate in particular situations, defining such limits will be difficult. But these difficulties do not themselves

justify the plurality's absolute rule. Due process in essence means fundamental fairness, and the Court's cases are replete with examples of judgments as to when such fairness has been denied an accused in light of all the circumstances . . . . The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances . . . . Much the same is true of analysis under our supervisory power. Nor do I despair of our ability in an appropriate case to identify appropriate standards for police practices without relying on the "chancellor's" "fastidious squeamishness or private sentimentalism" . . . .

425 U.S. 494 n. 6.

> I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement . . . .
>
> 425 U.S. 495 n. 7.

Extraordinarily high level police involvement in contraband activities, *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), is not the only example from

the existing jurisprudence in which due process and supervisory considerations have been involved. In *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1963), an ex-convict contacted Treasury Department agents and offered his services. The informer was employed on "a contingent fee arrangement to produce evidence against particular named defendants as to crimes not yet committed." 311 F.2d 444. The court held the government conduct to be intolerable.

In *Cox v. Louisiana*, 379 U.S. 559 (1965) the leader of a civil rights demonstration was convicted for picketing near a courthouse. No constitutional infirmity was found in the Louisiana statute. The police chief had given the demonstrators permission to congregate on the sidewalk across the street from the courthouse. The trial court found that the demonstration violated the statute. This Court reversed the conviction.

In dissent, Justice Black violently objected that "a police chief cannot authorize violations of his State's criminal laws." 379 U.S. 582. Similarly, Justice Clark observed, "I never knew until today that a law enforcement official — city, state or national — could forgive a breach of the criminal laws." 379 U.S. 588. The Court, however, held that Cox's reliance on the official's "administrative" decision prevented the conviction.

> This is not to say that had the appellant, entirely on his own, held a demonstration across the street from the courthouse within the sight and hearing of those inside, or a *fortiori*, had he defied an order of the police requiring him

> to hold this demonstration at some point further away out of the sight and hearing of those inside the courthouse, we would reverse the conviction as in this case.
>
> 379 U.S. 571-572.

The Court observed, "Obviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery." 379 U.S. 569.

Raley v. Ohio, 360 U.S. 423 (1959) was a prosecution for failing to answer questions put to the defendant at state legislative hearings. Ohio law conferred on such testificant transactional immunity. The legislative committee gave the defendant assurances that under the law, they had the right to assert their privilege against self-incrimination — an erroneous assurance under the law. Over state arguments that "some of appellants might have behaved the same way regardless of what the Commission told them," 360 U.S. 439 — i.e., "predisposition" — a unanimous Court reversed the convictions. The Court held:

> While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State — convicting a citizen for exercising a privilege which the State clearly had told him was available to him . . . . A State

may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them . . . . Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions . . . . Here there were more than commands simply vague or even contradictory. There was active misleading . . . . The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due process Clause permits convictions to be obtained under such circumstances.

360 U.S. 438-439.

It is noteworthy that the police official in *Cox* was not involved in the defendant's misconduct. And of course, the committee members in *Raley* were not state employees in the field of law enforcement. In neither of these due process cases were the crimes for which the defendants were convicted malum in se. Nor were the government officials motivated by a desire to prosecute.

The issues raised in the confluence of the concurrence and dissent in *Hampton, supra*, are important to the ongoing administration of justice in a highly regulated society. This case presents the due process and supervisory control issue in the context of administrative regulations which are malum

prohibitum; where there has been no finding of government corruption in the sense of bribery or extortion causing the violations; and indeed, where the local government agency may have "condoned and encouraged the unlawful practices of the appellees and others" in order to save (albeit misguidedly) the very purpose of the government program — "his job was to build the houses and get poor people into them." An inquiry limited to acts of law enforcement officials bent on prosecution (Court of Appeals approach) straightjackets the due process analysis, and immobilizes the Court in its supervisory function.

The factual context in which this case arises is common to many highly regulated areas of federal law, with their concomitant morasses of regulations. Reliance on the directives of administrative officials (who themselves have violated no criminal law, even though their directives may be wrong or illegal) is a bread and butter proposition for businessmen working with the federal government. The Court should take the opportunity presented by this case to resolve these important questions.

CONCLUSION

WHEREFORE, the Court should grant the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit reversing the dismissal of the indictment against petitioners.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this ____ day of December, 1977, served three copies each of the foregoing petition on all interested parties by depositing same in a United States mailbox, airmail postage prepaid, addressed as follows:

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

versus

Glen D. GRAVES, Lewis Weinstein, and Graves Construction Company, Inc., a/k/a Graves Construction, Inc.,
Defendants-Appellees.

No. 76-3526.

United States Court of Appeals,
Fifth Circuit.

Aug. 5, 1977.

Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The United States brings this appeal from the pretrial dismissal of an indictment charging appellees with conspiracy to submit false statements to the Federal Housing Administration ("FHA") and the completed substantive offenses.[1] The Government

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1 The indictment alleged violations of 18 U.S.C. §§ 371, 1010 and 2.

alleged that appellees had (a) fraudulently attempted to secure mortgage insurance under section 235 of the National Housing Act of 1968 for buyers whom they knew were not qualified; (b) falsified documents submitted to FHA concerning the income, assets, liabilities, credit, employment and other information pertaining to prospective mortgages; and (c) failed to comply with the statutory requirement of obtaining a $200 down payment from each prospective mortgagor and falsified documents pertaining thereto.

Prior to trial, the appellees filed motions to dismiss the indictment on the ground that FHA knew of, acquiesced in, approved, and encouraged the submission of false statements such as those alleged in the indictment. Characterizing the alleged actions of FHA officials as "outrageous governmental misconduct," the appellees sought dismissal of the indictment on the ground of entrapment as a matter of law. At a hearing on the motion, the Government objected to pretrial consideration of the entrapment issue and contended that entrapment could not be proven by showing misconduct by FHA officials who were not connected with the enforcement of criminal laws. Even after the district court permitted extensive testimony by defense witnesses, the Government declined to call rebuttal witnesses and continued to assert that consideration of the entrapment defense was premature. Citing *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949, 93 S.Ct. 1931, 36 L.Ed.2d 411 (1973), the district court then dismissed the indictment. We reverse.

I. *The Pretrial Hearing.*

Testimony adduced at the hearing showed that appellee Graves, during 1971, operated a home building company known as Graves Construction Company. Included among his customers were persons who sought FHA financing pursuant to section 235 of the National Housing Act of 1968, which applied only to low income families meeting certain standards. Prior to February or March, 1971, appellee Graves did not accept as potential customers any applicants who were unable to furnish the required $200 down payment.[2] Graves later discovered that persons whom his firm had rejected had obtained FHA-approved financing with rival builders only a short time after his firm had rejected them. He complained to the local FHA officials about this practice, but no action was taken by them in response.

At this point, Graves exercised self help to protect his interests in the 235 program. After making inquiries of several individuals who had been approved by other builders, he secured approximately 75 affidavits from home buyers who had not furnished the builder with the requisite $200 down payment or had otherwise failed to comply with applicable FHA regulations. When confronted with these statements, the FHA officials responded that the absence of the down payments was unimportant and that any of the FHA requirements could be waived.

---

2 Prior to that time appellee Graves complied fully with FHA regulations each time he submitted to FHA a customer's application for mortgage insurance under section 235. Among the requirements was the furnishing of a statement that the applicant had available for a down payment or had paid a minimum of $200 of unborrowed money.

Thereafter, appellee began accepting customers for FHA approved housing even though they did not have the required $200 down payment. The applications forwarded to FHA for these customers contained false statements that the down payment was available or had been paid. In defense of his actions, Graves testified at the pretrial hearing, taking the position that he was guilty of no wrongdoing because FHA officials had sanctioned his practices and those of his competitors.

II. *Did the Appellees' Motion Present a Jury Question?*

The appellant United States first presents the threshold question whether the district court erred by entertaining before trial the appellees' motion to dismiss on the ground of governmental misconduct. Since the defense is akin to entrapment, the Government argues, the question should have been presented to the jury for consideration. The appellees counter with the argument that an allegation of governmental misconduct is distinguishable from an entrapment defense in terms of the proof required. They contend that the focus of an entrapment defense is the predisposition of the defendant to commit the crime, whereas the focus in a governmental misconduct case is solely upon the actions of the government agents. They contend further that their motion to dismiss was "capable of determination without the trial of the general issue," as contemplated by Rule 12(b), Fed.R.Crim.P., thereby permitting its pretrial disposition by the court.

This case does not present what might be described as a "classic" entrapment defense. In the typical entrapment situation the defendant alleges that law enforcement officers have enticed him to commit an unlawful act which he had no predisposition to commit. In such a case, the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," *United States v. Russell*, 411 U.S. 423, 429, 93 S.Ct. 1637, 1641, 36 L.Ed.2d 366 (1973), rather than upon the conduct of the Government's agents. In the absence of a conclusive showing, this "subjective" approach[3] permits the jury to determine as a question of fact the defendant's predisposition to commit the crime.

Thus, the question is for the jury, unless the evidence is so clear and convincing that it can be passed on by the trial judge as a matter of law. *Sherman v. United States*, 356 U.S. 369, 377, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); *Coronado v. United States*, 266 F.2d 719 (5th Cir. 1959) *cert. denied*, 361 U.S. 851, 80 S.Ct. 112, 4 L.Ed.2d 90 (1959). In *Sherman* the court stated as follows:

> Furthermore, it was the position of Mr. Justice Roberts that the factual issue of entrapment — now limited to the question of what the government agents did — should be decided by the judge, not the jury. Not only was this rejected by the Court in *Sorrells*, [*Sorrells v. U. S.*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413] but

3 That the proper focus of a classic entrapment defense is upon the defendant's predisposition, rather than the conduct of the Government, was most recently reaffirmed in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976).

> where the issue has been presented to them, the Courts of Appeals have since *Sorrells* unanimously concluded that unless it can be decided as a matter of law, *the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.*
>
> 356 U.S. at 377, 78 S.Ct. at 823 (footnote omitted) (emphasis supplied).

It has also been said that the "issue of entrapment is a question for the jury unless as matter of law the defendant has established beyond a reasonable doubt that he was unlawfully entrapped." *Goss v. United States*, 376 F.2d 812, 813 (5th Cir. 1967) (per curiam). The notion that entrapment is generally a question for the jury finds support in Rule 12(b). The defendant's predisposition to commit an unlawful act will seldom be "capable of determination without the trial of the general issue."

In the instant case, however, the appellees do not assert a classic entrapment defense, *i. e.*, they do not argue that the government encouraged criminal acts in order to obtain a prosecution. Rather, they argue that the FHA officials were so involved in the corruption alleged that the law enforcement officials, representing an altogether different agency of government, should be precluded from bringing this prosecution.

Although the appellees perfunctorily assert the lack of any predisposition to commit the offenses alleged, the core of their entire defense is the alleged mis-

conduct of FHA officials. Their motion presented the question whether this conduct violated due process principles, as suggested in *Russell, supra*, to such an extent that judicial processes could not be invoked against them. Since their defense was predicated entirely on alleged governmental misconduct, and not upon the subjective predisposition of the appellees, it was an appropriate question for the court to resolve on a pretrial motion. To paraphrase Rule 12(b), the question presented could be answered without trial of the general issue. Moreover, the issue raised in appellees' pretrial motion was essentially a question of law, namely, whether the conduct of the FHA officials constituted outrageous governmental misconduct within the meaning of *Russell, supra* and *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Thus, it was properly a question for the court and not the jury.

Although this is a question of first impression in our Circuit, we note that the Eighth Circuit has adopted a rule substantially similar to that fashioned today. In *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976), the court affirmed the trial court's refusal to submit to the jury that aspect of the defendant's entrapment defense alleging outrageous governmental misconduct:

> Whether a person has been entrapped in [the conventional] sense of the term is ordinarily a question of fact for the jury with the burden being on the government to prove an absence of entrapment. In the instant case, as we have seen, the factual aspect of the defendant's claim of entrapment was submitted to the jury,

and the jury resolved it adversely to the defendant.

Recent cases have recognized, however, that apart from any question of predisposition of a defendant to commit the offense in question, governmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law or to move the courts in the exercise of their supervisory jurisdiction over the administration of criminal justice to hold that the defendant was "entrapped" as a matter of law. . . . (citations omitted) *A claim of entrapment on the basis of outrageous government involvement does not present any question for a jury to decide but solely a question of law for the court.* Thus, the district court did not err in refusing to submit that aspect of the defendant's entrapment defense to the jury.

543 F.2d at 647-48 (emphasis supplied) (citation omitted).

Despite the court's refusal to give the governmental misconduct instruction, it permitted the defendant's "classic" entrapment defense to go to the jury. Hence, the court drew the distinction we make today between the subjective predisposition question in a typical entrapment case and the legal question presented by a governmental misconduct defense. A plurality of the Supreme Court also has concluded that the governmental misconduct theory of entrapment is not a jury question. In *Hampton, supra*, five justices agreed that

under *Russell, supra*, a jury instruction encompassing such a defense was improper.[4] We therefore conclude that it was proper for the district court to entertain the appellees' pretrial motion to dismiss on the ground of governmental misconduct.

III. *Did the Appellees Demonstrate "Entrapment as a Matter of Law?"*

Upon the Government's failure to present rebuttal testimony during the pretrial hearing, the district court held that *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949, 93 S.Ct. 1931, 36 L.Ed.2d 411 (1973), was authority for dismissal of the indictment. In *Bueno* this court held that entrapment exists as a matter of law where a defendant sells contraband to one Government agent that has been furnished to him for distribution purposes by another Government agent or informer. Furthermore, we held that where a defendant has testified to facts tending to establish such a defense, the government may not rely on weaknesses in the defense, but must come forward with contrary proof. If the Government produces evidence that contradicts the defendant's testimony,

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4 The defendant in that case did not request a standard entrapment instruction, but he did request the following:

> The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have defined in your own minds, then the predisposition of the defendant would not matter.

the case should be submitted to the jury with proper instructions.

Since in the instant case the Government declined to present evidence to rebut the governmental misconduct defense, we must decide whether the district court was correct in holding that *Bueno* governs this case.

At the outset, we must accept this court's prior determination that *Bueno* remained valid after the Supreme Court's decision in *Russell*, *supra*. In *United States v. Workopich*, 479 F.2d 1142 (5th Cir. 1973), we noted that the Government in *Russell* had supplied the defendant with an ingredient that was itself legal, harmless and lawfully obtainable but was used to manufacture contraband. In contrast, the unrefuted testimony in *Bueno* established that the Government supplied the contraband itself. Since in *Workopich* the Government furnished United States currency that was legal in itself, the court determined that *Russell* rather than *Bueno* controlled.

In *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), the court also concluded that *Bueno* remained viable after *Russell*. Thus, even after *Russell*, this circuit applied the rule that where entrapment is an issue, the defendant may be acquitted for lack of predisposition, or, even though disposed, where one undercover agent supplies him with the contraband which he sells to another agent. *See United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974). Subsequent to the *Russell* decision, however, the Supreme Court decided

United States v. Hampton, *supra*, in which a plurality[5] of the court held that a classic entrapment defense is never available to a defendant who was predisposed to commit the crime charged. Nonetheless, five justices agreed that a court, in its supervisory capacity or under due process principles, could conceivably bar a conviction of a predisposed defendant because of outrageous police conduct.[6] Thus, the vitality of *Bueno* has again become questionable after *Hampton*.

Two previous panels of this court have declined to decide whether *Hampton* eliminated the so-called *Bueno* defense. In *United States v. Puma*, 548 F.2d 508 (5th Cir. 1977) the court stated as follows:

> Without discussing what vitality, if any, *Bueno* has in the wake of *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), we find the instant case clearly distinguishable. The per se rule of *Bueno* was called for because the offenses for which conviction was obtained were made possible "through the

5 See plurality opinion of Mr. Justice Rehnquist, in which Chief Justice Burger and Mr. Justice White joined, and the concurring opinion of Mr. Justice Powell, with whom Mr. Justice Blackmun joined. Justice Powell stated that "[he] agree[d] with the plurality that Russell definitively construed the defense of "entrapment" to be focused on the question of predisposition. "Entrapment" should now be employed as a term of art limited to that concept. (citation omitted). This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant. 425 U.S. 486 n. 2, 96 S.Ct. 1648 (1976) (Powell, concurring).

6 See the concurring opinion of Mr. Justice Powell, with whom Mr. Justice Blackmun joined, and the dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall concurred.

> creative activity of the government. The Defendant would not have had the heroin to sell if it had not been purchased by the Informer." 447 F.2d at 906. Here, on the other hand, the DEA became involved after the conspiracy had begun. The conspiracy was not instigated by the "creative activity of the government." The DEA only allowed the conspiracy to play itself out until the conspirators could be ascertained and apprehended. 548 F.2d at 510.

Subsequently, the court hinted, but did not decide, that *Hampton* may have extirpated *Bueno:*

> The Court's decision in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), handed down after the trial of this case, may well have eliminated the *Bueno* defense. In *Bueno* the Court found entrapment as a matter of law when unrebutted testimony showed that a Government informer had supplied illegal drugs to a defendant who then sold them to a Government agent. In that "full circle" transaction, the evil was
>
> > the government buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime.
>
> 447 F.2d at 905. *Bueno* was questioned after the Supreme Court's decision approving something akin to full circle conduct in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). This Circuit, however,

> distinguished *Russell* on the ground that the substance supplied in *Russell* was legal, and was only one ingredient of the drugs the Government agent purchased. *United States v. Oquendo*, 490 F.2d 161, 163 (5th Cir. 1974). *Hampton*, however, rejected that distinction and found no entrapment "per se" even though a full circle transfer of illegal drugs had taken place.
>
> *United States v. Evers*, 552 F.2d 1119, No. 76-1755 (5th Cir. 1977).

In *Evers* the court expressed doubt whether the defendant ever had a *Bueno* defense since his purchase of illegal drugs from a Government agent had not been followed by a sale of the drugs to another agent.[7]

We too find it unnecessary to decide whether *Bueno* survived *Hampton*. Whatever the fate of *Bueno*, it is now clear that the expression "entrapment as a matter of law," as used in that case, has become a misnomer with respect to predisposed defendants. There is still available in appropriate cases a governmental mis-

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7 The court stated in pertinent part as follows:

> The cases in this Circuit following *Bueno* and finding entrapment as a matter of law have been "full circle" cases. *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975); *United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974); *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974). While at least one federal district court has held a "half circle" to constitute entrapment, *United States v. Chisum*, 312 F.Supp. 1307 (C.D.Cal.1970), and another Circuit has suggested *Bueno* would apply to "half circle" cases, *United States v. Jett*, 491 F.2d 1078, 1081 (1st Cir. 1974), there is considerable doubt that defendants ever had a *Bueno* defense, especially after the decision in *Russell*. *United States v. Evers*, No. 76-1755, 552 F.2d at 1122 (5th Cir. 1977).

conduct defense grounded on the dual principles of due process and the supervisory powers of the court, but such a defense does not fall within the narrow confines of "entrapment" as that term has been explicated in *Russell* and *Hampton*.

In light of the foregoing discussion, we proceed to an analysis of the instant case. The district court dismissed the indictment because the Government refused to rebut the defendant's governmental misconduct defense. As indicated above, that procedure has been followed in this Circuit when the defendant establishes the factual situation presented in *Bueno* and the Government fails to rebut the defendant's allegations. The facts of the instant case, however, present none of the abuses addressed by the *Bueno* rule. There is no indication that the FHA employees here induced Graves to commit unlawful acts for the purpose of prosecuting him for those acts. They acted in concert with him, but he did not become immune from prosecution because they condoned or even encouraged his unlawful activity. Were we to uphold the appellees' defense, anyone dealing with corrupt government bureaucrats could expect to join them in crime without fear of prosecution. Hence, to the extent that *Bueno* is still valid, appellees did not even fall within its protective wall.

In addition, we conclude that this is not the case presaged by the Supreme Court when it stated: "We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to

obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)."

We can discern no due process rights of the appellees which were offended by this prosecution. In *Hampton*, the Supreme Court made the following observation, which applies with equal force to this case:

> The limitations of the Due Process Clause of the Fifth Amendment and of those portions of the Bill of Rights which it has been held to incorporate, come into play only when the government activity in question violates some protected right of the *defendant*. Here, as we have noted, the police, the government informer, and the defendant acted in concert with one another. If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission, . . ." *Sorrells, supra*, 287 U.S., at 442, 53 S.Ct. [210] at 221, 77 L.Ed.2d, at 417, the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. See *O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674, 687 (1974); *Imbler v. Pachtman*, 424 U.S. 409, 428-429, 96 S.Ct. 984, 994, 47 L.Ed.2d 128 (1975). But the police conduct here no more

> deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights. (emphasis in original).
>
> 425 U.S. at 490, 96 S.Ct. at 1650.

Moreover, we do not believe that the type of conduct by FHA officials alleged in this case requires this court, as suggested in *Hampton*, to exercise its supervisory powers to bar conviction.

The appellees not only failed to establish the factual predicate required for a *Bueno* defense, *i. e.*, a "full circle" sale of contraband, they raised the novel contention that the defense of "outrageous governmental misconduct" applies to governmental employees outside the field of law enforcement. Here, the inducements were alleged to have been made by individuals employed by the government in a capacity completely unrelated to criminal law enforcement. The FHA officials had no authority with respect to enforcement of criminal laws, and their actions were not undertaken for the purpose of prosecuting appellees.

The appellees cite three cases for the proposition that a defendant may assert an entrapment defense against government employees who are not law enforcement officers: *United States v. Tatar*, 439 F.2d 1300 (9th Cir. 1971); *cert. denied*, 404 U.S. 866, 92 S.Ct. 69, 30 L.Ed.2d 109 (1971); *United States v. Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed.2d 550 (1962); *Lunsford v. United States*, 200 F.2d 237 (10th Cir. 1952). In each of these cases, tax-

payers had attempted to procure favorable determination of their tax liability by bribing revenue agents who were auditing their returns. The agents all reported the incidents to their superiors and agreed to cooperate in efforts to obtain evidence of bribery. In all three cases no entrapment was found, and in *Lunsford* the entrapment charge given by the trial court was declared by the Tenth Circuit as "plain, understandable language." None of these cases considered the issue of whether entrapment could be based upon the conduct of the revenue agents, but it is clear that the agents were attempting to obtain evidence for use in a criminal prosecution.

The FHA officials here were acting in no such capacity. Unlike the agents in the trilogy of cases cited by appellees, the government employees in this case condoned and encouraged the unlawful practices of the appellees and others. The prosecution of the appellees occurred despite their efforts and not because of any "entrapment" or governmental misconduct affecting the rights of the appellees.

We are aware that inducement from a private citizen cannot be deemed sufficient to support a claim of entrapment. *United States v. Maddox*, 492 F.2d 104 (5th Cir. 1976), *cert. denied*, 419 U.S. 851, 95 S.Ct. 92, 42 L.Ed.2d 82 (1974). It is likewise apparent that entrapment can occur as a result of efforts of informers who are merely private citizens but acting under governmental direction. *See United States v. Groessel*, 440 F.2d 602 n. 1 (5th Cir. 1971), *cert. denied*, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971), citing *Sherman v. United States*, 356 U.S. 369, 373-74, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). Where a government infor-

mant is acting in the capacity of a law enforcement officer, however, his actions must be governed by the entrapment defense. Since the FHA officials here were disregarding the law, and not enforcing it, such a case is inapposite to our inquiry.

REVERSED and REMANDED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ SUSAN M. GRAVOIS
Deputy
New Orleans, Louisiana

OCT. 20, 1977

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 12, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3526 — U.S.A. v. GLEN D. GRAVES, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, on behalf of appellees, Glen D. Graves, et al., and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Messrs. Thomas W. Turner
Mervyn Hamburg
Messrs. James E. Wilson
D. H. Perkins
Mr. William Gerhardt
Mr. John R. Martzell